"competitive checklist." Failure by the BOC to provide or generally offer one or more of the "competitive checklist" items will be fatal to the BOC's application.[52]

BellSouth's Application must be rejected because the carrier has not "met its burden of showing that it has . . . [made available] access to . . . [all fourteen "competitive checklist" items] in accordance with the requirements of Section 271(c)(2)(B)."[53]

1. BellSouth Has Not Made Telecommunications Services Available For Resale At Wholesale Rates In Accordance With Sections 251(c)(4) And 252(d)(3)

BellSouth has a statutory obligation "to offer for resale at wholesale rates any telecommunications service that . . . [it] provides at retail to subscribers who are not telecommunications carriers" and "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications services."[54] BellSouth has not made the requisite showing with respect to the availability of telecommunications services for resale. In particular, BellSouth has declined to offer for resale at wholesale rates customer-specific agreements and voice messaging services.

In enacting Section 251(c)(4), Congress was clearly cognizant that "the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market

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52 Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 105.

53 Id.

54 47 U.S.C. § 251 (c)(4).

power and may reflect an attempt by incumbent LECs to preserve their market position."[55] "Recognizing that incumbent LECs possess market power, Congress prohibited unreasonable restrictions on resale."[56] For its part, the Commission, acknowledging "the probability that restrictions and conditions may have anticompetitive results," made clear that "resale restrictions are presumptively unreasonable."[57] As explained by the Commission, "[t]his presumption should reduce unnecessary burdens on resellers seeking to enter local exchange markets, which may include small entities, by reducing the time and expense of proving affirmatively that such restrictions are unreasonable."[58]

In blatant disregard of this holding, BellSouth excludes from those services made available for resale at wholesale rates selected services which are essential to successful resale of local exchange service in competition with an incumbent LEC. For example, BellSouth has declined to make "contract service arrangements" available at wholesale rates.[59] As acknowledged by BellSouth, contract service arrangements are made available "on the same terms, and conditions, including rates, BellSouth offers to the end user customers."[60] As set forth in BellSouth's SGATC:

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55 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 939.

56 Id.

57 Id.

58 Id.

59 BellSouth Brief at 66-69.

60 Id. at 66.

> B. Discounts. Retail services are available at discounts as ordered by the Commission . . . Discounts apply to intrastate tariffed service prices except that discounts do not apply to the following services:
>
> > 1. Contract Service Arrangements. BellSouth's contract service arrangements entered into after January 28, 1997 are available for resale only at the same rates, terms and conditions offered to BellSouth end users.[61]

Compounding this glaring deficiency, BellSouth will not permit competitive LECs to aggregate the usage of multiple end users to satisfy the volume requirements of individual contract service arrangements; indeed, BellSouth will not permit competitive LECs to market a contract service arrangement to any end user other than the customer to which it was originally provided.[62]

BellSouth asserts that this restriction is reasonable and nondiscriminatory because, as expressed by the LPSC, "[r]equiring BellSouth to offer already discounted CSAs for resale at wholesale prices would create an unfair advantage for AT&T," and the "PSC's decision on this pricing matter is determinative."[63] Moreover, BellSouth avers, "the Louisiana PSC's policy regarding CSAs does not place CLECs at any competitive disadvantage" and "[t]here is no possible basis for speculation that BellSouth might seek to convert customers to CSAs in order to 'evade' the Louisiana PSC's 20.72 percent wholesale discount."[64]

Both the Commission and the U.S. Court of Appeals for the Eighth Circuit have ruled otherwise, and basic common sense and practical experience dictate to the contrary. Although

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61 BellSouth SGATC at pp. 20 - 21, § XIV.B.

62 BellSouth Brief at 67, fn. 43.

63 Id. at 66 - 67.

64 Id. at 68 - 69.

"unable to predict every potential restriction or limitation an incumbent LEC may seek to impose on a reseller," the Commission identified several resale restrictions which it would not tolerate.[65] Included among "restrictions [that] should be considered presumptively unreasonable" were restrictions on the resale of "contract and other customer-specific offerings."[66] "A contrary result," the Commission remarked, "would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act."[67] Moreover, the Commission declared that:

> With respect to volume discount offerings . . . it is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in aggregate, under the relevant tariff, meets the minimum level of demand.[68]

The U.S. Court of Appeals for the Eighth Circuit upheld these conclusions, rejecting claims that "the FCC's determination that discounted . . . offerings are 'telecommunications service[s]' that are subject to the resale requirement of subsection 251(c)(4) . . .[was] arbitrary and capricious and beyond the Commission's jurisdiction."[69] Indeed, the Court expressly held that "the FCC has jurisdiction to issue these particular rules and that its determinations are reasonable

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65 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶¶ 939, 948, 953.

66 Id.

67 Id at ¶ 948.

68 Id. at ¶ 953.

69 Iowa Utilities Board v. FCC, 120 F.3d 753 (1997) ("Iowa Utilities Board"), *modified* 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997), *pet. for cert. pending sub. nom* AT&T Corp. v. Iowa Utilities Board (Nov. 17, 1997).

interpretations of the Act."[70] Critically, the Court, in so doing, recognized that the Commission's implementing rules "restrict[] the ability of incumbent LECs to circumvent their resale obligations under the Act."[71]

As to BellSouth's claim that "[t]here is no possible basis for speculation that BellSouth might seek to convert customers to CSAs in order to 'evade' the Louisiana PSC's 20.72 percent wholesale discount,"[72] one need only look at the thousands of contract tariffs filed by AT&T to dispense with this painfully self-serving contention. To the extent that they do not have to be made available at wholesale rates to resale carriers, contract service arrangements will not only be an obvious, but an effective, means of avoiding resale obligations.

BellSouth has also declined to make available for resale at wholesale rates voice messaging services.[73] The Commission has ruled that the duty to offer for resale "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers" encompasses all services listed in an "LEC's retail tariffs."[74] Moreover, this obligation includes "bundled service offerings."[75] Under these criteria, as well as the Commission's general holding that restrictions on resale are presumptively unreasonable, BellSouth should be required to specify wholesale rates for voice messaging services. BellSouth not only

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70 Id.

71 Id.

72 BellSouth Brief at 69.

73 *See* Appendix 1 attached hereto.

74 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶¶ 871, 872.

75 Id. at ¶ 877.

offers voice messaging as a retail offering, but it incorporates voice mail into such bundled offerings as Complete Choice.[76]

Voice mail has become an integral part of local exchange service for many business and residential consumers. As the California Public Utilities Commission has recently concluded, "CLCs need access to the LECs' Voice Mail service for resale purposes in order to permit CLCs to offer end users a competitive overall service package."[77] Without resale access to voice messaging services, many consumers will not consider changing their local exchange carrier and without access to voice messaging at wholesale rates, resale carriers will be placed at a severe economic disadvantage.

Until BellSouth makes all of its retail service offerings available for resale at wholesale rates, it has not complied with the final element of the 14-point "competitive checklist."

2. BellSouth Has Not Provided Access To Network Elements On An Unbundled Basis In Accordance With Sections 251(c)(3) And 252(d)(1)

a. BellSouth Has Failed To Demonstrate That It Provides Nondiscriminatory Access To All OSS Functions

The Commission has repeatedly emphasized the critical importance of operations support systems ("OSS") to the ability of new market entrants to compete with incumbent LECs using unbundled network elements or resold services:

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[76] BellSouth Application, Appx. D, Tab 6 (Affidavit of Aniruddha Banerjee), p. 4.

[77] Competition for Local Exchange Service, R. 95-04-043, I. 95-04-044, Decision 97-08-059 (Calif. PUC, Aug. 1, 1997).

> [T]he massive operations support systems employed by incumbent LECs, and the information such systems maintain and update to administer telecommunications networks and services, represent a significant barrier to entry. It is these systems that determine, in large part, the speed and efficiency with which incumbent LECs can market, order provision and maintain telecommunications services and facilities. Thus, we agree with Ameritech that "[o]perational interfaces are essential to promote viable competitive entry."[78]

The Commission has been no less adamant with respect to the obligation of incumbent LECs to provide nondiscriminatory access to OSS functionalities:

> We conclude that an incumbent LEC must provide nondiscriminatory access to [its] operations support systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing available to the LEC itself. Such nondiscriminatory access necessarily includes access to the functionality of any internal gateway systems the incumbent LEC employs in performing the above functions for its own customers. . . . Obviously, an incumbent that provisions network resources electronically does not discharge its obligation under section 251(c)(3) by offering competing providers access that involves human intervention, such as facsimile-based ordering.[79]

Critically, the Commission also determined that "nondiscriminatory access to OSS functions was a 'term or condition' of unbundling other network elements under section 251(c)(3), or resale under section 251(c)(4):"

> In order for a BOC to be able to demonstrate that it is providing the items enumerated in the checklist (*e.g.*, unbundled loops, unbundled local switching, resale services), it must demonstrate, *inter alia,* that it is providing nondiscriminatory access to the systems, information, and personnel that support those elements or services. Therefore, an examination of a BOC's OSS performance is integral to our determination whether a BOC is 'providing' all of the items contained in the competitive checklist. Without equivalent access to the BOC's

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[78] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 516.

[79] Id. at ¶ 523.

> operations support systems, many items required by the checklist, such as resale services, unbundled loops, unbundled local switching, and unbundled local transport, would not be practically available.[80]

In determining whether a BOC has met its OSS obligation under Section 271, the Commission will look first to "whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them."[81] Next, the Commission "must determine whether the OSS functions that the BOC has deployed are operationally ready, as a practical matter."[82] Under this second inquiry, the Commission must determine whether the OSS functions "are actually handling current demand and will be able to handle reasonably foreseeable demand volumes."[83] And the Commission has recognized that "the most probative evidence that OSS functions are operationally ready is actual commercial usage."[84]

BellSouth touts the "tested" capacity of its "combined electronic interfaces" as "10,000 total requests per day."[85] These figures, however, are for a nine state region and encompass all competitive LECs. The per-state and per-carrier values are dramatically smaller; indeed,

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80 Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 132.

81 Id. at ¶ 136.

82 Id.

83 Id. at ¶ 138.

84 Id.

85 BellSouth Brief at 27 - 28.

assuming an even distribution of capacity across states and across carriers,[86] the per-day values drop to minimal levels. And these limited per-state, per-carrier, per-day values represent both the pre-ordering inquiries that are necessary to prepare the service orders, as well as the service orders themselves. Or, in other words, these per-state, per-carrier, per-day values represent precious few customers for individual carriers.

Moreover, it is TRA's understanding that the two available BellSouth electronic interfaces for ordering and provisioning non-complex services, including residence and business lines and customer calling services -- *i.e.*, Local Exchange Navigation System ("LENS") and Electronic Data Interchange ("EDI") -- route orders through a local exchange ordering database and then through either a Local Exchange Service Order Generator ("LESOG") or the Local Carrier Service Center ("LCSC"). The capacity of the LESOG is apparently half of the BellSouth-predicted capacity of the "combined electronic interfaces," creating a bottleneck apart from the initial OSS interface.

Second, in arguing for the operational readiness of its OSS interfaces, BellSouth relies principally on "extensive internal testing."[87] As the Commission has recognized, "internal testing . . . [is] a far less reliable indicator[] of actual performance than commercial usage."[88] While

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[86] The National Association of State Regulatory Commissioners ("NARUC") reports that there are over 250 competitive LECs in the BellSouth nine-state region, including 16 in Alabama, 96 in Florida, 40 in Georgia, 14 in Kentucky, 21 in Louisiana, 14 in Mississippi, 23 in North Carolina, 10 in South Carolina, and 22 in Tennessee. NARUC, Telecommunications Competition 1997, Sec. I, Table 1 (1997). BellSouth notes that it "has executed approved agreements with 70 different telecommunications carriers" in Louisiana alone. BellSouth Brief at 6.

[87] BellSouth Brief at 26.

[88] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No.

BellSouth claims that it "received more than 16,500 electronic orders for resale services in September alone," and has processed "3,500 trouble reports . . . through the maintenance and repair interface,"[89] not only do these values represent a fraction of what will occur in the event local competition takes hold, they fail to reflect activities with respect to other OSS functions or other uses of OSS functions, such as ordering unbundled network elements or network interconnection. With respect to these other OSS functions and uses, BellSouth lacks not only adequate commercial experience, but, given the "internal" nature of the testing, sufficient input and experience with prospective users -- *i.e.,* competitive LECs.

The deficiencies in BellSouth's nine-state wholesale support processes were succinctly summarized by the U.S. Department of Justice in its evaluation of BellSouth's application for "in-region," interLATA authority in the State of South Carolina:

> As to the current interfaces offered by BellSouth for pre-ordering and ordering functions, we conclude that BellSouth has failed to demonstrate that they will allow for effective competition, and that BellSouth's on-going efforts to address our concerns on this score are still incomplete. The record indicates numerous complaints from CLECs that they have not yet been able to obtain sufficient information from BellSouth to permit them to complete their own development of their own OSSs. BellSouth's systems have experienced little commercial use, but that limited experience suggests potentially serious system inadequacies that have not yet been fully addressed. Moreover, the limited capacity of key systems suggests that performance problems are likely to be far more serious when competitors begin to order unbundled network elements or resale services in competitively significant volumes. . . . BellSouth's failure to institute all of the necessary wholesale performance

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97-137, FCC 97-298 at ¶ 138.

[89] BellSouth Brief at 23.

measurements prevents a determination that BellSouth is currently in compliance with checklist requirements or that compliance can be assured in the future.[90]

b. BellSouth Has Not Proposed To Provide Unbundled Local Switching In A Manner Consistent With Statutory Mandates

BellSouth has elected to make "the vertical features of a switch available as UNEs" and has established a charge for these vertical features separate from those it assesses for access to unbundled local switching.[91] The Commission has defined the local switching element "to encompass line-side and trunk-side facilities plus the features, functions and capabilities of the switch."[92] "The 'features, functions, and capabilities' of the local switch," the Commission correctly recognized, include "all vertical features that the switch is capable of providing, including custom calling, CLASS features, and Centrex, as well as any technically feasible customized routing functions."[93] "Thus," the Commission explained, "when a requesting carrier purchases the unbundled local switching element, it obtains *all switching features in a single element on a per-line basis*."[94]

The Commission expressly rejected arguments that the local switching element should be "further unbundl[ed] . . . into a basic switching element and independent vertical feature

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[90] Evaluation of the United States Department of :Justice submitted in CC Docket No. 97-208 on November 4, 1997 at 28 - 29.

[91] BellSouth Brief at 54 - 55.

[92] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 412.

[93] Id.

[94] Id. (emphasis added).

elements."[95] Moreover, the Commission rejected claims that vertical switching features should be treated as retail services.[96]

BellSouth would essentially achieve both rejected ends by establishing separate rates for vertical features included within the local switching element.

c. BellSouth Has Not Demonstrated That The Manner In Which It Will Deliver Network Elements Allows Them To Be Combined

Section 251(c)(3) requires incumbent LECs to "provide . . . unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service[s]."[97] While the U.S. Court of Appeals for the Eighth Circuit disagreed with the Commission's view that Section 251(c)(3) "require[d] incumbent LECs, if necessary, to perform the functions necessary to combine requested elements in any technically feasible manner either with other elements from the incumbent's network, or with elements possessed by new entrants,"[98] the Court agreed with the Commission that incumbent LECs must "allow entrants access to their networks" in order to "combine the unbundled elements themselves."[99] Accordingly, in order to demonstrate "competitive checklist" compliance, BellSouth must show that

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95 Id. at ¶ 414.

96 Id. at ¶ 413.

97 47 U.S.C. § 251(c)(3).

98 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 293.

99 Iowa Utilities Board v. FCC, 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997).

it is providing unbundled network elements in a manner which allows them to be combined by requesting carriers.

While BellSouth asserts that it "will perform all services necessary to make UNEs available to CLECs so that CLECs themselves may combine the UNEs" and adds that it "will also perform network software modifications that are necessary for the proper functioning of CLEC-combined BellSouth UNEs at no additional charge," the carrier concedes that it has not yet "establish[ed] detailed terms and conditions" governing such activity.[100] For this failure, BellSouth faults new market entrants and defiantly declares that the necessary terms and conditions "may not be dictated by . . . [the] Commission (much less the Department of Justice)."[101] BellSouth then proceeds to rewrite the Telecommunications Act to limit the extent of its obligations to making "colocation space available to CLECs and . . . deliver[ing] UNEs to this collocation space."[102] Only "[w]here obtaining access to the UNE at the CLEC's collocation space is not practical," will BellSouth "make access available at another appropriate location."[103]

For all its sound and fury, BellSouth's showing of how it will make unbundled network elements available so that they may be combined by requesting carriers amounts to virtually nothing. First, BellSouth provides no details as to which elements may be combined where and how such elements may be combined and at what cost. BellSouth has acknowledged that "detailed terms and conditions" are necessary, but offers no insight as to the content of these terms and conditions.

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100 BellSouth Brief at 46 - 47.

101 Id. at 47.

102 Id. at 48.

103 Id.

Asserting that it cannot be required to "anticipate all the services CLECs may in the future request to assist in combining UNEs," BellSouth anticipates none, including the most basic services.[104] Indeed, BellSouth acknowledges that it "has not had occasion to address these issues."[105] The extent of BellSouth's commitment is captured in its SGATC:

> A requesting carrier is entitled to gain access to all of the unbundled network elements that when combined by the requesting carrier are sufficient to enable the requesting carrier to provide telecommunicatoins service. Requesting carriers will combine the unbundled elements themselves.[106]

Wholly apart from this lack of detail, the limitations BellSouth imposes on a requesting carrier's combination of unbundled network elements are blatently discriminatory. BellSouth does not limit its own personnel to collocation cages and restrict access by such personnel to network elements in these limited spaces. Nondiscriminatory treatment would require reasonable network-wide access by requesting carriers, obviously undertaken under the supervision of BellSouth personnel. Absent such pervasive network access, requesting carriers will not be able to provide comparable local exchange service, particularly if existing network combinations are dismantled before the component elements are delivered.

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104 Id. at 47.

105 Id.

106 BellSouth SGATC at p. 8, § II.F.

d. Deficiencies In BellSouth's OSS Functionalities Render Access To Unbundled Network Elements and Wholesale Service Offerings Inadequate

As noted previously, the Commission, noting that "[w]ithout equivalent access to the BOC's operations support systems, many items required by the competitive checklist, such as . . . unbundled loops, unbundled local switching, and unbundled local transport, would not be practically available," has recognized that an examination of a BOC's OSS performance is "integral to [its] determination whether a BOC is 'providing' all of the items contained in the competitive checklist."[107] Thus, the Commission has mandated that a BOC "must demonstrate, *inter alia,* that it is providing nondiscriminatory access to the systems, information, and personnel that support those elements or services," before it can be determined to have made available access to "the items enumerated in the checklist (*e.g.,* unbundled loops, unbundled local switching, resale services)."[108]

As discussed above, BellSouth has failed to demonstrate that it is providing or capable of providing nondiscriminatory access to OSS functions. Accordingly, the carrier has also failed to show that it is making available or is capable of making available nondiscriminatory access to network elements on an unbundled basis. The same OSS failing also undermines BellSouth's claims that it has satisfied the resale requirements of Section 251(c)(4). As the Commission has succinctly stated, neither a network element nor a wholesale offering is "practically available" if it cannot be ordered, maintained, repaired or invoiced in a timely and efficient manner.

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[107] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 132.

[108] Id.

D. BellSouth Has Signaled Its Intention Not To Comply With Sections 251(g) And 272(e)(4)

It should not escape the Commission's attention that the careful wording of BellSouth's Brief evinces the carrier's clear intention not to restrict its activities post grant of "in-region," interLATA authority to the Commission's view of the scope and applicability of various statutory mandates. In a glaring example of such disregard, BellSouth uses its Application as a vehicle to "petition[] the Commission to reconsider the Michigan Order's discussion of Ameritech's proposed 'marketing script'".[109] In the passage to which BellSouth objects, the Commission held that

> Mentioning only Ameritech Long Distance unless the customer affirmatively requests the names of other interexchange carriers is inconsistent on its face with our requirement that a BOC must provide the names of interexchange carriers in random order. Such a practice would allow Ameritech Long Distance to gain an unfair advantage over other interexchange carriers. . . a BOC must 'provide any customer who orders new local exchange service with the names and, if requested, the telephone number of all the carriers offering interexchange services in its service area. *Moreover, we conclude[] that the 'BOC must ensure that the names of the interexchange carriers are provided in random order.'*"[110]

By asserting, in the face of crystal clear evidence of the limitations imposed by Section 272 on joint marketing activities, specifically enacted "to effectuate the goal of preventing anticompetitive abuses by BOCs that control essential local facilities and seek to enter competitive

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[109] BellSouth Brief at 79.

[110] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 376 (*citing* Non-Accounting Safeguards Order, 11 FCC Rcd. at 22046).

markets that require these facilities as an input,"[111] that "[a]ny requirement that the BOC's long distance affiliate be mentioned only as part of a random list would nullify the BOC's statutory joint marketing right,"[112] BellSouth provides two equally crystal clear messages. The first message is that, even before it has attained Section 271 authority, BellSouth has little intention of confining itself to the parameters of acceptable joint marketing activities as set forth in Section 251 where doing so would inhibit its ability to prefer its in-region affiliate over every other long distance carrier. The second message is that BellSouth will not feel restrained by interpretations of Section 272 with which it disagrees, even if those views are espoused by the Commission.

In another passage, BellSouth again demonstrates its lack of conviction to fully embrace and comply with obligations imposed by the Act as implemented by the Commission. Indicating that "to the extent that [it] is permitted to provide interLATA or intraLATA facilities or services to [its long distance affiliate], [it] will make such services or facilities available to all carriers at the same rates and on the same terms and conditions, in accordance with section 272(e)(4),"[113] BellSouth ignores as inconvenient the Commission's holding that regardless of whether such facilities, services or information are made available to other providers of interLATA services, "[t]he leasing of capacity on an in-region interLATA network is plainly an in-region interLATA service . . . [a]nd as we conclude in this *Second Order on Reconsideration*, because section 272(e)(4)

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[111] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 97-222, ¶ 10 (rel. June 24, 1997); *pet. for review pending sub nom.* Bell Atlantic Telephone Companies v. FCC, Case No. 97-1432 (D.C. Cir. July 11, 1997).

[112] BellSouth Brief at 81.

[113] Id. at 79.

is not a grant of authority, a BOC may not directly provide in-region interLATA services until the separate affiliate requirement is removed."[114]

The Commission has stated that "evidence that a BOC applicant has violated federal telecommunications regulations or engaged in anticompetitive conduct is relevant to our inquiry under section 271, and would be considered in the public interest analysis."[115] In TRA's view, multiple indications of an intention to violate regulations or otherwise engage in anticompetitive conduct *in the future*, such as those advanced by BellSouth, are likewise directly relevant to the merits of a BOC's Section 271 application and should be considered carefully by the Commission here.

E. Grant Of The BellSouth Application Would Not Be Consistent With The Public Interest, Convenience And Necessity

The final evaluative task assigned to the Commission under Section 272(d)(3) is the determination of whether grant of the "in-region," interLATA authorization sought by BellSouth would be "consistent with the public interest, convenience, and necessity.[116] The public interest standard is a necessarily broad test incorporating a host of considerations. As the Commission has recently noted, "[c]ourts have long held that the Commission has broad discretion in undertaking .

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[114] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 97-222 at ¶ 54.

[115] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 374.

[116] 47 U.S.C. § 271(d)(3)(C).

. . public interest analyses."[117] Indeed, "section 271 grants the Commission broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region, interLATA market is consistent with the public interest.[118]

1. The Commission May Properly Consider In Its Public Interest Analysis BellSouth's Refusal To Make Available To New Market Entrants Existing Combinations Of Network Elements

BellSouth declares in its Application that "if a CLEC wishes to obtain an existing retail service from BellSouth on a pre-combined, 'switch-as-is' basis, BellSouth will provide this service as a wholesale service, at the retail rate less the 20.72 percent resale discount set by the Louisiana PSC."[119] Citing the U.S. Court of Appeals for the Eighth Circuit's recent ruling, BellSouth asserts that it may dismantle existing combinations of network elements before delivering the component network elements to a requesting competitor. While strongly disagreeing with the Eighth Circuit's reading of Section 251(c)(3), TRA acknowledges that the Court held that Section 251(c)(3) does not require incumbent local exchange carriers ("LECs") to make available "assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements)." This ruling, however, does not foreclose consideration by the Commission of a BOC's failure to make available existing combinations of network elements. Rather, it simply precludes the Commission from directing an incumbent LEC to do so.

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[117] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 384.

[118] Id. at ¶ 383.

[119] BellSouth Brief at 44.

As the Commission has properly recognized, "[S]ection 271 grants the Commission broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region, interLATA market is consistent with the public interest."[120] "Courts have long held that the Commission has broad discretion in undertaking such public interest analyses," and "[t]he legislative history of the public interest requirement in section 271 indicates that Congress intended the Commission, in evaluating section 271 applications, to perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications Act."[121] It is thus clear that "Congress granted the Commission broad discretion under the public interest requirement in section 271 to consider factors relevant to the achievement of the goals and objectives of the 1996 Act."[122]

"The 1996 Act's overriding goal is to open all telecommunications markets to competition."[123] Congress "sought to open local telecommunications markets to previously precluded competitors not only by removing legislative and regulatory impediments to competition, but also by reducing inherent economic and operational advantages possessed by incumbents."[124] Recognizing, however, that BOCs "have little, if any, incentive to assist new entrants in their efforts to secure a share of the BOCs' markets," the Congress embodied in Section 271 "a critically

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120 Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298, ¶ 383 (Aug. 19, 1997).

121 Id. at ¶¶ 384, 385.

122 Id. at ¶ 385.

123 Id. at ¶ 10.

124 Id. at ¶ 13.

important incentive for BOCs to cooperate in introducing competition in their historically monopolized local telecommunications markets."[125]

To facilitate competitive entry into the local exchange market, Congress "require[d] incumbent LECs, including BOCs, to share their networks in a manner that enables competitors to choose among three methods of entry into local telecommunications markets, including those methods that do not require a new entrant, as an initial matter, to duplicate the incumbent's networks."[126] Recognizing that new market entrants "will adopt different entry strategies that rely to varying degrees on the facilities and services of the incumbent and that such strategies are likely to evolve over time," Congress "did not explicitly or implicitly express a preference for one particular entry strategy, but rather sought to ensure that all procompetitive entry strategies are available."[127] The Commission's "public interest analysis of a section 271 application, consequentially, must include an assessment of whether all procompetitive entry strategies are available to new entrants."[128]

The Commission has made clear that mere compliance with the "competitive checklist" is not sufficient to establish that grant of "in-region," interLATA authority to a BOC is consistent with the public interest, convenience and necessity. As reasoned by the Commission, "Congress' adoption of the public interest requirement as a separate condition for BOC entry into the in-region, interLATA market demonstrates that Compliance with

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125 Id. at ¶ 14.

126 Id. at ¶ 13.

127 Id. at ¶ 387

128 Id.

the checklist alone would be sufficient to justify approval under section 271."[129] Thus, the Commission has signaled that it will make a "case-by-case" determination . . . examin[ing] a variety of factors in each case . . . [including whether] the various methods of entry contemplated by the 1996 Act . . . [are] truly available."[130]

The Commission has found that "the ability of new entrants to use unbundled network elements, as well as combinations of unbundled network elements, is integral to achieving Congress's objective of promoting competition in the local telecommunications market."[131] The Commission has further correctly concluded that "limitations on access to combinations of unbundled network elements would seriously inhibit the ability of potential competitors to enter local telecommunications markets through the use of unbundled elements, and would therefore significantly impede the development of local exchange competition."[132] As the Commission explained, "in practice, it would be impossible for new entrants that lack facilities and information about the incumbent's network to combine unbundled elements from the incumbent's network without the assistance of the incumbent." Moreover, as the Commission has noted, "dismantling of network elements, absent an affirmative request, would increase the costs of requesting carriers and delay their entry into the local exchange market, without serving any apparent public benefit."[133]

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[129] Id. at ¶ 13.

[130] Id. at ¶ 13.

[131] Id. at ¶ 332.

[132] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶¶ 10 - 23.

[133] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 97-295 (Aug. 18, 1997), *pet. for rev. pending sub. nom.,* Southwestern Bell Telephone Co. v. FCC, Case No. 97-3389 (Sept. 5, 1997).

In short, the Commission has found that the public interest lies in opening the local exchange market to competition and that access to combinations of unbundled network elements is integral to achieving this goal. The Commission has recognized that Congress intended for it to exercise broad discretion in structuring and conducting its public interest analysis under Section 271, and that such analysis must include an assessment of whether all three of the market entry vehicles made available in the 1996 Act are truly available. And the Commission has concluded that permitting BOCs to dismantle existing network platforms before providing them to new market entrants as unbundled network elements would seriously diminish the viability of unbundled network elements as a market entry option. Given these predicates, the Commission would certainly be on solid ground in considering a BOC's failure to make available to new market entrants existing combinations of network elements in assessing whether the public interest would be served in granting the BOC authority to enter the "in-region," interLATA market.

2. BellSouth Has Not Demonstrated That Local Exchange Competition Has Taken Root In The State of Louisiana

Obviously, a critical element of a public interest analysis involving market entry is the competitive impact of such entry.[134] TRA agrees with the Commission that the inclusion of a public interest test among the Commission's evaluative requirements reflects a Congressional mandate that the Commission assess the impact of BOC provision of "in-region," interLATA service on both nascent local and existing long distance competition.[135] Certainly, the public interest test

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[134] Id.; *see, e.g.*, FCC v. RCA Communications, Inc., 346 U.S. 86, 90 - 91 (1953).

[135] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶¶ 385 - 88.

is not a license for the Commission to reduce or expand the "competitive checklist;" Section 271(d)(4) makes this clear.[136] Congress clearly intended a more "macro" analysis involving a broad assessment of competitive and consumer impacts.

It is TRA's strongly-held belief that the public interest would not be served by authorizing BellSouth to originate interLATA service within the State of Louisiana until such time as consumers in at least the largest metropolitan areas within the State are able to select among two or more established facilities-based providers of local exchange/exchange access service and interstate switched access charges have been reduced to reflect the economic cost of originating and terminating long distance traffic. By established facilities-based providers, TRA is referring to competitive local exchange carriers that are, and have been for some modicum of time, operational and are providing dial tone and other local services to a significant number of customers. A critical mass of customers is an essential element because a provider's ability to attract customers is a demonstration of its and its service's operational viability, which in turn confirms the BOC's compliance with the Telecommunications Act's mandate that services and facilities provided to a new market entrant must be at least of equal quality to that the BOC provides to itself. Market share, while not a perfect indicator, is also a useful gauge of the viability of competition in a market.[137] As the Commission has recently noted:

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[136] 47 U.S.C. § 271(d)(4). As the Commission recognized, a proposed amendment that would have eliminated the public interest test because it was duplicative of the "competitive checklist" was soundly defeated by the Senate. Cong. Rec. 57960 - 7971 (daily ed. June 8, 1995). Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 389.

[137] *See, e.g.,* United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

> The most probative evidence that all entry strategies are available would be that new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban and rural) in the relevant state, and at different scales of operation (small and large).[138]

As monopoly or near monopoly providers of local exchange/exchange access service, the BOCs retain the ability to (i) hinder competitive entry into local markets; (ii) undermine the competitive viability of new entrants into the local market; and (iii) adversely impact existing providers of interLATA service. The BOCs will retain the ability to impede local, and diminish long distance, competition so long as they retain control of local "bottleneck" facilities. This ability to act anticompetitively will diminish only when competitive providers of local exchange/exchange access service who are not dependent upon BOC network services establish a solid competitive foothold, thereby eroding the local "bottleneck." Until a BOC's control of "bottleneck" facilities no longer encompasses the larger part of the population of a State, authorizing the BOC to originate interLATA service within that State would not only not serve, but would be directly contrary to, the public interest. Such a premature action would deny the residents of the State not only the potential benefits of local exchange/exchange access competition, but reduce the existing benefits to those consumers of long distance competition.

The telephony provisions of the 1996 Act are designed, among other things, to open the monopoly local exchange/exchange access markets to competitive entry, eliminating "not only

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[138] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298 at ¶ 391.